IN THE SUPREME COURT OF OHIO

Melisa Arbino,	:	On Questions Certified by
	:	the United States District Court
Petitioner,	:	for the Northern District
	:	of Ohio, Western Division
v.	:	
	:	Case No. 06-1212
Johnson & Johnson, *et al.*,	:	
	:	U.S. District Court Case No.
Respondents.	:	3:06 CV 40010

AMICUS CURIAE REPLY BRIEF OF MOTHERS AGAINST DRUNK DRIVING (MADD) IN SUPPORT OF PETITIONER

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Amicus MADD's Reply to Respondents' Arguments as to Certified Question of Law No. 1 and 2:

Certified Question No. 1:
Is Ohio Revised Code 2315.18 [non-economic damage cap], as amended by Senate Bill 80, effective, April 7, 2005, unconstitutional on the grounds as stated by the Plaintiffs?

S.B. 80 is, at its core, an effort to sacrifice the constitutional rights of Ohio citizens, rights guaranteed by Article I of the Ohio Constitution, ostensibly to improve the business climate in Ohio. This Court recently confronted a similar attempt to flaunt governmental power at the expense of the constitutional rights of Ohio citizens in *City of Norwood v. Horney* (2006) 110 Ohio St. 3d 353, 853 N.E. 2d 1115. Justice O'Connor, writing for a unanimous court, refused to override "our consistent holdings throughout the past two centuries" that "economic development itself" is not sufficient to override a fundamental constitutional right. *Id.* at 378, 853 N.E. 2d at 1141. While *City of Norwood* concerned the constitutionally guaranteed right to own property guaranteed by Section 19, Article I, of the Ohio Constitution, the right to trial by jury guaranteed by Section 5, Article I is equally considered to be "inviolate." As such, the constitutional right to trial by jury cannot be cast aside for the mere expedient of satisfying private business interests. Just as in *City of Norwood*, this Court must deny the request that it depart from, and overrule, two centuries of Ohio jurisprudence merely to promote the private economic interests of those with more power and influence than the individual citizens who appear before this Court. This Court should not cavalierly set aside the constitutional rights of Ohio citizens. Amici request that this Court hold SB 80 unconstitutional, and protect the rights of the citizens of Ohio.

Defendant Johnson & Johnson, Intervenor State of Ohio, and their supporting amici all put forth an unjustifiably crabbed view of the jury-trial right that Section 5, Article I of the Ohio

Constitution declares "inviolate" and that this Court has denominated "fundamental." *Cleveland Ry. Co. v. Halliday* (1933), 127 Ohio St. 278, 284, 188 N.E. 1, 3. Under their shared view, the jury's assessment of damages merely triggers whatever legal consequences that the General Assembly deems appropriate, without regard to the facts proven at trial.

The understandings of the Framers, and actual practice, dictates that the right to trial by jury apply more fully than Respondents would have it. The Ohio Constitution preserves the right to a jury trial in those civil actions where the right existed prior to its adoption. *Belding v. State ex rel. Heifner* (1929), 121 Ohio St. 393, 169 N.E. 301, paragraph one of the syllabus; *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 533 N.E.2d 743; *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 421, 633 N.E.2d 504, 510 (jury-trial right applies to "those causes of actions where the right existed at common law at the time the Ohio Constitution was adopted."). The U.S. Supreme Court has taken the same position with respect to the cognate right under the Seventh Amendment. *Markman v. Westview Instruments, Inc.* (1996), 517 U.S. 370, 376 ("Since Justice Story's day, we have understood that '[t]he right of trial by jury thus preserved is the right which existed under the English common law when the [Seventh] Amendment was adopted.'") (quoting *Baltimore & Carolina Line, Inc. v. Redman* (1935), 295 U.S. 654, 657). Explaining that application further, the U.S. Supreme Court has stated "the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to 'soun[d] basically in tort,' and seek legal relief."). *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999), 526 U.S. 687, 709 (citing *Curtis v. Loether* (1974), 415 U.S. 189, 195-96. This Court used a similar description to explain the breadth of this right in *Sorrell*, *supra* (because "negligence actions, which evolved from the common-law action of trespass on the

case, and battery actions existed at common law at the time of the adoption of our state Constitution, Section 5, Article I is an inviolate and fundamental right that applies to the actions herein.").

Contrary to Johnson & Johnson's revisionist history that wrongly treats statutorily created causes as exemplars for treatment of common-law causes of action, both federal and state law has consistently declared that the "right to a jury trial includes the right to have a jury determine the amount of . . . damages." *Feltner v. Columbia Pictures Television, Inc.* (1998), 523 U.S. 340, 353. The unanimous decision in *Feltner* stated as follows:

> "[I]n *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935), the Court stated that "the common law rule as it existed at the time of the adoption of the Constitution" was that "in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." Id., at 480, 55 S.Ct., at 298 (internal quotation marks and citations omitted). And there is overwhelming evidence that the consistent practice at common law was for juries to award damages. See, e.g., *Duke of York v. Pilkington*, 2 Show. 246, 89 Eng. Rep. 918 (K.B.1760) (jury award of £100,000 in a slander action); *Wilkes v. Wood*, Lofft 1, 19, 98 Eng. Rep. 489, 499 (C.P.1763) (jury award of £>1,000 in an action of trespass); *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (C.P.1763) (upholding jury award of £>>>>>300 in an action for trespass, assault and imprisonment); *Genay v. Norris*, 1 S.C.L. 6, 7 (1784) (jury award of £400); *Coryell v. Colbaugh*, supra (sustaining correctness of jury award of exemplary damages in an action on a promise of marriage); see also K. REDDEN, PUNITIVE DAMGES*354." 523 U.S. 340, *354, 118 S.Ct. 1279, **1287) § 2.2, p. 27 (1980) (describing "primacy of the jury in the awarding of damages").

The right to trial by jury is of foundational importance to the American system and was, in part, responsible for the birth of our country. The Declaration of Independence charged England with "depriving us in many cases, of the benefit of trial by jury." DECL. OF INDEP. & 20 (U.S. 1776). In fact, "Trial by Jury" was the only right universally secured by the 13 original American state constitutions. *Parklane Hosiery Co. v. Shore* (1979), 439 U.S. 322, 341

(Rehnquist, J., dissenting) (citations omitted). Without its guarantee, the federal Constitution would never have been ratified:

> One of the strongest objections originally taken against the constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. *Parsons v. Bedford* (1830), 28 U.S. (3 Pet.) 433, 445 (Story, J.).

Amicus MADD's Reply to Respondents' Arguments as to Certified Question of Law No. 4:

Certified Question No. 4:
Is Ohio Revised Code 2315.21 [Punitive Damage Restrictions], as amended by Senate Bill 80, effective April 27, 2005, unconstitutional on the grounds as stated by the Plaintiffs?

The Respondents' briefs all take a decidedly different tone when their arguments shift from compensatory damage restrictions to punitive damage restrictions. Most notably, the Ohio Attorney General asserts, "The time has come for the Court to reconsider the constitutionality of limits on punitive damages...." (Br. of Respondent State of Ohio, p. 23; filed January 5, 2007). Not only is it notable, from the standpoint that there is recognition by the Respondents of the constitutional infirmity of the legislation, but it is also notable (and troubling) that the State's Attorney General is advocating for legislation that is constitutionally flawed. This is not the role the State's Attorney should fill. *See e.g.,* R.C. 109.02. Rather, it should advocate to the General Assembly that unconstitutional legislation should not be passed in the first place.

Instead, the Respondents put forth a somewhat disingenuous argument that because recent U.S. Supreme Court precedent has placed limitations on punitive damage awards, that this somehow is an invitation for the Ohio General Assembly to go even further in placing unwarranted arbitrary limits on these type of remedies. For the reasons that follow, this Court should decline Respondents' invitation to change Ohio's Constitution.

A. Revised Code §2315.21 Does Not Assess Punitive Damages Based Upon the Reprehensibility of a Defendant's Actions And Does Not Provide Punishment or Deterrence

This Court has long recognized the distinction between compensatory damages and punitive damages. The Court has noted that "the purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct." *Moskovitz v. Mount Sinai Medical Center* (1994), 69 Ohio St.3d. 638, 651. Unlike compensatory damages, which are calculated based upon the losses suffered by the victim, punitive damages focus upon the reprehensibility of the defendant's conduct:

> We held in *Wightman* that "a punitive damages award is more about defendant's behavior than the plaintiff's loss." 86 Ohio St.3d at 439, 715 N.E.2d 546. The focus of the award should be the defendant, and the consideration should be what it will take to bring about the twin aims of punishment and deterrence as to that defendant. *Dardinger v. Anthem Blue Cross & Blue Shield*, 2002 Ohio 7113, ¶178

This Court has further adopted the balancing test set forth in *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, in an effort to set forth elemental notions of fairness. *Dardinger v. Anthem Blue Cross & Blue Shield*, 2002 Ohio 7113, ¶152. The guideposts set forth in *BMW* include the degree of reprehensibility of the defendant's conduct, the disparity between the harm suffered by the plaintiff and the amount of punitive damage awards, and the difference between the punitive damage award and civil and/or criminal penalties authorized or imposed in similar cases. *BMW*, 517 U.S. at 574-575. In doing so, this Court noted that the United States Supreme Court in *BMW* described the degree of reprehensibility of the defendant's conduct as "perhaps the most important indicium of the reasonableness of a punitive damage award." *Id.* at 575. (emphasis added) *See, also,* OWEN, DAVID G. *A PUNITIVE DAMAGES OVERVIEW: FUNCTIONS, PROBLEMS AND REFORM,* 39 VILL. L. REV. 363, 387 (1994) ("The flagrancy of the misconduct is

thought to be the primary consideration in determining the amount of punitive damages." (quoted in *BMW,* 517 U.S. at 575 n.23)). *BMW* made plain the primacy of reprehensibility reflected in a long line of precedent that focused on the enormity of the offense. *BMW,* 517 U.S. at 575, citing *Day v. Woodworth,* 54 U.S. (13 How.) 363 (1851).

"The principle that punishment should fit the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Gore*, 517 U.S. at 576, n.24. The U.S. Supreme Court's punitive damages jurisprudence, as it culminated in *Gore* and *State Farm Mutual Auto. Insurance Co., v. Campbell* (2003), 538 U.S. 408, invoked *Gore*'s first principle that "punitive damages should be proportional to the wrongfulness of the defendant's actions." 347 F.3d at 672. This rule squares with "the core of the Aristotelian notion of corrective justice ...that sanctions should be based on the wrong done rather than on the status of the defendant; a person is punished for what he does, not who he is..." *Id.*

R.C. 2315.21 de-couples punitive damages from the conduct of the tortfeasor, thereby dismantling the reprehensibility-punitive damages connection. Instead the punitive damages award is linked only to the economic value of the victim's loss or the wealth of the tortfeasor, both of which are capped at $350,000. The United States Supreme Court has stated that "[t]he wealth of a defendant cannot serve to justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at 427. Surely the corollary principle must likewise be upheld: a punitive damages award cannot be limited by the economic value of the victim's losses or subject

to an arbitrary cap. However, that is precisely what R.C. 2315.21 attempts to accomplish.[1]

The draconian effects of this statute would be felt most acutely by those who find themselves the victims of defendants who drive while impaired. No matter how impaired a tortfeasor is, how many repeated times that tortfeasor has driven impaired, or how many fall victim, the tortfeasor is protected by R.C. 2315.21. Consider two drivers, both driving impaired, one barely over the legal limit of blood alcohol content (0.08 g/dl) and the other near the maximum blood alcohol content that a human body can tolerate (0.45 g/dl). If they both cause the same economic harm to a victim, their "punishment" via punitive damages is the same. Consider now that the first driver causes the injury in a single car collision while the second, highly inebriated driver, causes the same injury while fleeing from the police and striking numerous other vehicles before colliding with the victim. Their "punishment" is the same. The first lightly intoxicated driver strikes a pedestrian and injures her, resulting in $5,000 in economic loss. The second, highly intoxicated driver hits and kills a homeless person. The only economic loss is $5,000 in funeral expenses. Their punishment, under the statute is the same.

Wrecks involving those who are driving drunk or impaired frequently involve repeat offenders. About one-third of all drivers arrested or convicted of driving while intoxicated or driving under the influence of alcohol are repeat offenders. FELL, JIM. "REPEAT DWI OFFENDERS IN THE UNITED STATES." WASHINGTON, DC: NATIONAL DEPARTMENT OF TRANSPORTATION,

[1] R.C. 2315.21would eviscerate the effectiveness of punitive damages in cases that need them most, such as murder and mayhem by hate groups. *See, e.g., Macedonia v. Christian Knights of the KKK* (Charleston Co., S.C., 1988), No. 96-14217 (church burning) (punitive award $21.5 million; ratio 71.67:1); *McKinney v. Southern Knights of the KKK* (N.D. Ga. 1988), No. 1:87-565-CAM (punitive award $831,578.93; ratio 332.62:1) (attack on civil rights march); *Berhanu v. Metzger and White Aryan Resistance* (Ore. App. 1993), 850 P.2d 373; *cert denied*, 511 U.S. 1106 (1994) (racial murder) (punitive award $10 million; ratio 10.25:1). *See* www.splcenter.org/legal/docket/files for additional cases.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION TRAFFIC TECH NO. 85, FEBRUARY 1995. The risk of a driver who has one or more DWI convictions becoming involved in a fatal crash is about 1.4 times the risk of a driver with no DWI conviction. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION. "REPEAT DWI OFFENDERS ARE AN ELUSIVE TARGET." WASHINGTON, DC: NATIONAL DEPARTMENT OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION TRAFFIC TECH NO. 217, MARCH 2000. R.C. 2315.21 does not care how many times a person drives drunk or how many victims he racks up; its caps are absolute and bear no relationship to the conduct of the driver.

R.C. 2315.21 also immunizes those who drive while impaired who injure or kill multiple victims in one spree. Take an example where an impaired driver hits and kills someone in Indiana, proceeds to drive into Kentucky and, while still impaired, strikes and injures someone else. This driver then proceeds into Ohio where his car crashes head on into another car, seriously injuring or killing all four family members in that car. R.C. 2315.21(D)(5)(a) provides such a defendant with immunity from punitive damages for these multiple injuries or fatalities. That section states that if a defendant files evidence of a previous judgment where punitive damages have been awarded and paid based upon the "same act or course of conduct that is alleged to have caused the injury or loss to person or property for which the plaintiff seeks compensatory damages", then no further punitive damages may be assessed against that defendant. If the Indiana or Kentucky victims obtain punitive damage awards in their state first, those would act as a bar or set off to any award that the Ohio victims may seek. Most tragically, the four Ohio family members killed or maimed would have their own punitive damages awards against this driver set off from each other's award!

R.C. 2315.21 removes and undoes the hallmark purpose of punitive damages, namely to deter and punish. Tying punitive damages primarily to the compensatory damages award in cases not limited to economic loss exploits the gap between compensatory damages and harm, to the advantage of the wrongdoer. As the U.S. Supreme Court emphasized in the first sentence of its decision in *State Farm, supra*, punitive damages are the measure of punishment that a state imposes upon a defendant in a civil case. 538 U.S. at 412. The plaintiff is a state agent in such a case, serving to protect and promote societal interests in punishment and deterrence. Restricting the range of punitive damages to the economic value of that plaintiff's loss, when his life or health has also been forfeited, will predictably frustrate the legitimate purposes of punitive damages, rather than promote them in most cases, and will certainly fail to achieve the purposes of punitive damages in cases at the high end of the reprehensibility scale – where they are most needed.

B. Punitive Damage Awards are Deeply Rooted in the Traditional Function of Ohio's Jury System:

Punitive damage awards in Ohio have been seen as a function of the jury. In fact, a few short years after Ohio ratified its Second Constitution[2], Courts had opportunities to review the propriety and function of punitive damage awards in the Ohio tort system. In *Roberts v. Mason* (1859), 10 Ohio St. 277, a jury had awarded compensatory and punitive damages to an assault victim in June, 1877. The batterer appealed the verdict to this Court, arguing that it was error for

[2] The second constitution shifted authority away from the General Assembly, more in favor of the balance of power that exists today. It was drafted during the Constitutional Convention in 1850-51, and adopted on June 17, 1851. It became effective on September 1, 1851.

him to be both criminally prosecuted and subject to punitive damages in a civil case. This Court recognized that the question had been debated at the time:

> That in cases of tort, where express malice is shown to have prompted the wrong complained of, the law, instead of adhering to the rule of compensation merely, permits a jury to go further, and, blending together the interest of society and of the individual aggrieved, to give damage not only to recompense the sufferer, but to punish the offender, is a doctrine which has of late been questioned.

Roberts, at 280. However, after reviewing Ohio case law on point, as well as case law outside of Ohio and scholarly treatises of the day[3], this Court settled on the rule that allows punitive damages as a separate additional award ("In an action to recover damages for a tort which involves the ingredients of fraud, malice, or insult, a jury may go beyond the rule of mere compensation to the party aggrieved, and award exemplary or punitive damages; and this they may do, although the defendant may have been punished criminally for the same wrong."). Such awards by a jury should be permitted, this Court observed, to "operate as a salutary restraint upon the evil passions of bad men." *Id.*

One year later, Judge Spencer, a trial judge sitting in the Superior Court in Cincinnati, gave the following jury instruction in a malicious prosecution case:

> As to the measure of damages, (in the event of the jury finding for the plaintiff,) any actual injury he sustained, any expense he sustained thereby or through loss of business, was properly chargeable against the defendants. The first effort of a jury should be to make compensation for the actual damage sustained; but beyond this the law allows vindictive damages, or "smart money," as it is sometimes called, for the sake of preserving the peace of society from malicious wrong. In this respect it would be proper to discriminate between the defendants according to the degree of malice shown by each, but if all acted for a common purpose, all were alike guilty.

Ehrman v. Hoyt (1858) 3 Ohio Dec. Reprint 308, 1858 WL 4543.

These cases stand at odds with the historical underpinnings of the Seventh Amendment to the United States Constitution as described by the U.S. Supreme Court in its decision in *Cooper Indus. v. Leatherman Tool Group* (2001), 532 U.S. 424, 121 S.Ct. 1678. In *Leatherman*, the U.S. Supreme Court held,

> "Because the jury's award of punitive damages does not constitute a finding of "fact," appellate review of the district court's determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by respondent and its amicus."

Leatherman at 437. In *Leatherman*, the U.S. Supreme Court made the observation that punitive damages had evolved from the period of time when the U.S. Constitution was drafted (1787) until the mid-19th century, when Ohio's constitution was drafted:

> "[P]unitive damages have evolved somewhat since the time of respondent's sources. Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time."

Leatherman at 437, 1686. Clearly, as can be seen from the cases cited above, when Ohio's Constitution was drafted in 1851, punitive damages had evolved into a distinct concept, over and above compensatory damage awards. Whereas, when the Bill of Rights to the United States Constitution were drafted, punitive damages, according to the *Leatherman* Court, were simply another form of compensatory damages. This is a critical distinction that must be made when considering an invitation to remove a centuries-old jury-function from a jury's province.

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3 Sedgwick, Arthur G., *The Measure of Damages*, p. 455, et seq.

Another important limitation of which this Court must be aware, is the refusal that the *Leatherman* Court made to extend its holding to individual states. Specifically, the Court declined to go so far as to preempt all states in the characterization of whether or not punitive damages are a jury function. In this regard the Court held,

> Respondent argues that our decision in *Honda Motor Co. v. Oberg*, 12 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994), rests upon the assumption that punitive damages awards are findings of fact. In that case, we held that the Oregon Constitution, which prohibits the reexamination of any fact tried by a jury," Ore. Const., Art. VII, § 3, violated due process because it did not allow for any review of the constitutionality of punitive damages awards. Respondent claims that, because we considered this provision of the Oregon Constitution to cover punitive damages, we implicitly held that punitive damages are a "fact tried by a jury." Brief for Respondent 27-28. It was the Oregon Supreme Court's interpretation of that provision, however, and not our own, that compelled the treatment of punitive damages as covered. See *Oberg*, 512 U.S., at 427, 114 S.Ct. 2331; see also *Van Lom v. Schneiderman*, 187 Or. 89, 93, 210 P.2d 461, 462 (1949) (construing the Oregon Constitution).

Leatherman at 437, 1686 fn. 10.

So while this Court has linked arms with the United States Supreme Court in some matters having to do with the Seventh Amendment, it is not advisable to walk blindly, lock-step, without an understanding of the historical differences between the United States and the Ohio Constitutions. It should continue to follow the long-standing precedent that punitive damage awards are a function of the jury; and therefore, any attempt to place arbitrary limits on them violate the right to trial by jury of the victims of drunken drivers.

C. Respondents' Argument Supports the Notion that the Punitive Damage System in Ohio is not Broken

Respondents contend that because the United States Supreme Court has expressly recognized that state legislatures are empowered to limit awards of punitive damages, Ohio should exercise its prerogative in this regard. Respondents, however, are leaping to fix a problem which has not been proven to exist in Ohio. Moreover, the limits prescribed by R.C. 2315.21 create a problem that has been railed against by all of the U.S. Supreme Court precedent cited by Respondents, to wit: arbitrary remedies which have no rational relationship to the particular harm of each individual case.

The mechanisms that existed in Ohio prior to the enactment of S.B. 80 have been proven to be effective in limiting punitive damage awards and guarding against run-away jury verdicts. Protections had already existed in several mechanisms that this Court established in the Rules of Civil Procedure, the Rules of Evidence, substantive law, and Appellate Review.

First, a plaintiff must satisfy Civ. R. 11 requirements for filing a complaint, and then overcome a pre-trial motion for summary judgment under Civ.R. 56. This Court has held that an award of punitive damages requires something more than mere negligence. See, *Preston v. Murty* (1987), 32 Ohio St.3d 334, 335 (citing *Leichtamer v. American Motors Corp.* (1981), 67 Ohio St.2d 456, 472, and *Detling v. Chockley* (1982), 70 St.2d. 134, 138). See, also *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470 ("Misconduct greater than negligence is required for an award of punitive damages."), and *Couch v. DeSilva* (1991), 77 Ohio App.3d 278, 288.

In order to overcome a summary judgment motion a Plaintiff must come forward with some triable fact that demonstrates actual malice. Ohio courts define "actual malice" as follows:

> "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. In the latter case, before submitting the issue of punitive damages to the jury, a trial court must review the evidence to determine if reasonable minds can differ as to whether the party was aware his or her act had a great probability of causing substantial harm. Furthermore, the court must determine that sufficient evidence is presented revealing that the party consciously disregarded the injured party's rights or safety. If submitted to the jury, the trial court should give an instruction in accordance with the law we announce today."

Preston, 32 Ohio St.3d at 336.

If the plaintiff successfully overcomes a motion for summary judgment, at trial, he or she must establish by clear and convincing evidence[4] that the Plaintiff is entitled to them, and the jury is instructed, in accordance with OJI 23.71, as follows:

> "Punitive damages may be awarded against the defendant as a punishment to discourage others from committing similar wrongful acts. You are not required to award punitive damages to the plaintiff, and you may not do so unless you find that the plaintiff has met his/her burden to prove by clear and convincing evidence that the defendant acted with the following action(s) or omission(s): (A) malice; (or) (B) aggravated or egregious fraud;(or) (C) the defendant knowingly authorized, participated in, or ratified as principal or master, the actions or omissions of an agent or servant that demonstrate aggravated or egregious fraud)."

Again, here exists another layer of protection for the defendant who may be assessed with punitive damages. The jury is instructed that they are "not required" but "may" award damages, which has proven to be sufficient in addressing egregious actions.

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4 *Cabe v. Lunich* (1994), 70 Ohio St.3d 598, 601, 640 N.E.2d 159.

Yet, even if a jury awards punitive damages, the defendant is protected by the trial judge's obligation to perform a remittitur in the appropriate circumstances according to four criteria necessary for a court to order a remittitur: (1) unliquidated damages are assessed by a jury, (2) the verdict is not influenced by passion or prejudice, (3) the award is excessive, and (4) the plaintiff agrees to the reduction in damages. *Shaffer v. Maier* (1994), 68 Ohio St.3d 416, 627 N.E.2d 986.

In the event that a jury's award of punitive damages is found to meet the four necessary criteria for a court to order a remittitur, recognizing an excessive award, the court will reduce the total punitive damages. This demonstrates yet another protective mechanism in place for the benefit of the defendant.

While the system established by this Court allows for particularized punitive damage awards, R.C. 2315.21 sets an arbitrary multiplier in limiting punitive damages, the result of which is rewarding a drunken driver with an arbitrarily-defined low limit before an action even goes forward. R.C. 2315.21 effectively removes the vital role of the court in determining punitive damages. This Court has recognized that "[p]unitive damages awards should not be subject to bright-line division but instead should be considered on a case-by-case basis, with those awards making the most significant societal statements being the most likely candidates for alternative distribution." *See, Dardinger, supra.* This Court continued by stating that "[t]he purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct." *Id.* The Court properly draws our attention to the defendant's actions and furthers this point by holding "[t]he focus of a punitive damages award should be the defendant, and the

consideration should be what it will take to bring about the twin aims of punishment and deterrence as to that defendant." *Id.*

With R.C. 2315.21 in place, it is not only the award of punitive damages that is limited, but also the fundamental "aims" discussed in *Dardinger*. With an arbitrary low limit set in legislative stone, the court's function of punishment and deterrence, that was once enabled by awards of punitive damage, is handicapped. This sends an unintended message to drunk drivers that no matter what the facts of the case may involve, and no matter how malicious the action, punitive damages are arbitrarily limited.

Another safeguard that pre-dated S.B. 80 was the Supreme Court of the United States recognition that the Due Process Clause of the Fourteenth Amendment imposes a substantive limit on the level of punitive damages. *Honda Motor Co., Ltd v. Oberg* (1994), 512 U.S. 415, 114 S.Ct. 2331; *BMW, supra.*

Some Respondents mis-construe the holding of *Gore* to argue that a single-digit multiplier in all cases is appropriate. A closer reading of the U.S. Supreme Court cases countenances a much different, indeed opposite, notion: "We have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula," and again made an issue to reiterate a rejection of a categorical approach in light of particular fact patterns that may arise. *Gore* at 583. The *Gore* Court did recognize in a particular case that an award of "more than 4 times the amount of compensatory damages' might be 'close to the line'"(citing *Haslip,* 499 U.S. at 23), in other cases, a ratio of 10:1 was held to be appropriate (citing TXO, 509 U.S., at 462). *Gore* at 581.

The Supreme Court of the United States never prescribed destroying the states' ability to further legitimate interest in punishing drunk drivers, by limiting awards of punitive damages by an arbitrary multiplier. Although, the Court cautioned the states by suggesting a 500 to 1 ratio of punitive to compensatory damages must surely "raise a suspicious judicial eyebrow", they maintain a recognition of the state courts' role in deterring malicious conduct and its repetition. This role is centered, in civil cases against drunk drivers, on the award of punitive damages.

The Supreme Court of the United States discussed acceptable ratios of punitive to compensatory ratios in *Gore* by analyzing the facts of each particular case before them. Likewise, the award of punitive damages in Ohio should be considered on a case-by-case basis.

R.C. 2315.21 takes the ability of the courts to consider actions on a case-to-case basis. It limits the ability of the courts to deter outrageous actions and their repetition. Protective mechanisms are already in place to police high punitive damages awards, mechanisms that have proven their worth before the enactment of S.B. 80.

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